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ORIGINAL

(2)

No. 92-5653

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSIE LEE JOHNSON

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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27pp

QUESTIONS PRESENTED

1. Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

2. If, during voir dire in a capital case, a prospective juror states that she would not consider a teenage capital defendant's youth to be a mitigating factor in rendering a decision on punishment, should the trial judge dismiss the prospective juror for cause at the request of defense counsel?

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DORSIE LEE JOHNSON

Petitioner,

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THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Dorsie Lee Johnson, respectfully requests that this Court grant certiorari to review the judgment and opinion of the Texas Court of Criminal Appeals.

CITATION TO OPINION BELOW

The en banc opinion of the Texas Court of Criminal Appeals is published, Johnson v. State, 773 S.W.2d 322 (Tex. Crim. App. 1989). A copy of the opinion is attached as Appendix A. The Court of Criminal Appeals denied Mr. Johnson's motion for rehearing on May 27, 1992. A copy of the opinion is attached as Appendix B.

JURISDICTION

Mr. Johnson invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The issues in this case implicate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution which read, in pertinent part:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Eighth Amendment

> [N]or [shall] cruel and unusual punishments [be] inflicted.

Fourteenth Amendment

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

It also involves the former Texas capital sentencing statute, Tex. Code Crim. Proc., Art. 37.071, which provided in pertinent part:

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . . .

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

Dorsie Lee Johnson, a nineteen year-old, black male was indicted by a Scurry County, Texas grand jury in May 29, 1986, for the March 23, 1986 capital murder of Jack Huddleston, a white male. The indictment alleged that Mr. Johnson intentionally caused the death of Mr. Huddleston in the course of committing a robbery. See Tr. at 2. A jury convicted Mr. Johnson of capital murder on November 12, 1986.

During voir dire, defense counsel questioned venireperson Susan Kiker regarding her feelings about youth as a potential mitigating factor during her deliberations at the punishment phase. Ms. Kiker stated that an individual who committed a crime should be dealt the same punishment despite his chronological or mental age. S.F. vol. X:4087.

> Q. Well, again, you know, if you have a young person and of you heard -- if you had already found him guilty of one crime and you heard evidence of other similar

crimes ---.

A. You know, a younger person -- just because he's a younger person, say, fifteen or nineteen or twenty, doesn't necessarily mean his maturity is all that young or old. And, you know, a younger person may have the mind of a very mature adult. So I can't say that just because he is young and in his younger years that as he grew older he might not ever commit another crime because I know a lot of forty year old men that are still very young.

Q. You would agree that he could also...[h]ave a very immature mind...for whatever age, nineteen, eighteen, that they might have the maturity of a twelve year old, for instance.

A. That's right.

Q. Do you think that type person should be treated the same as the person who was nineteen and had the maturity of a twenty-five year old? Talking about a person who, say, was nineteen and had the maturity level of a twelve year old?

A. Should they be treated the same? In what instance? This instance right now?

Q. In the punishment phase?

A. A punishment type situation, yes, I do. I think so. I think they should be treated the same.

S.F. vol. X:4085-87. The court overruled defense counsel's challenge for cause regarding Ms. Kiker, and denied his request for an additional peremptory challenge. S.F. vol.X:4110. Ms. Kiker became juror number eight at Mr. Johnson's trial.

At the punishment phase defense counsel beseeched the jury to consider Mr. Johnson's age as a mitigating factor:

> Mitigating circumstances are those that indicate that you should be less harsh with your punishment, if you will. That is one way to look at it. They mitigate, lessen the harshness of it.
>
> So, as to deliberate, did he have full realization of what he was doing and what the effect would be of what he was doing? You found that he intentionally shot him. That is true. So, now, was it deliberate? Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. But the other one you heard -- do you remember -- first off, you have heard much testimony from several people that he had gotten involved in drugs, the use of marijuana and the use of cocaine. I would suggest that when people get so involved with the drugs that they cannot contemplate what their actions and what the consequences of their actions is going to be, that they cannot formulate decisions and deliberate with full realization of what they are doing.

S.F. vol. XV:434. The trial court instructed the jury only on the two special issue questions, which the jury answered affirmatively. Therefore, in accordance with the law, the trialcourt sentenced Mr. Johnson to death.

B. How the Issues Were Raised and Decided Below

In his direct appeal to the Texas Court of Criminal Appeals, Dorsie Johnson raised seven points of error. Point of error five argued that the trial court erred in overruling Mr. Johnson's challenge for cause as to venireperson Susan Kiker on the grounds that she could not consider age as a mitigating factor in the punishment phase and in failing to grant Mr. Johnson an additional peremptory challenge upon request. The Texas Court of Criminal Appeals rejected Mr. Johnson's argument holding that "[t]he mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge." Johnson v. State, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989).

Mr. Johnson's motion for rehearing raised the constitutional error, in light of Penry v. Lynaugh, 492 U.S. 302 (1989), of the

trial court's failure to excuse jurors Barbee, Kiker, and Lammert for cause. Mr. Johnson argued that because each of these jurors had stated at voir dire that they would not consider his youth as a mitigating circumstance at sentencing, all three jurors should have been struck for cause. The Court of Criminal Appeals declined to consider these points of error on rehearing.

Mr. Johnson further urged rehearing of the trial court's failure to instruct the jury that it could consider and give effect to the mitigating evidence of youth, based upon this Court's (then) recent holding in Penry v. Lynaugh, 492 U.S. 302 (1989). Mr. Johnson noted that this court ruled in Penry merely five days following the Texas Court of Criminal Appeals' affirmation of Mr. Johnson's death sentence. He argued that "Penry stands for the proposition that the jury in a capital case should be provided with a vehicle for expressing its 'reasoned moral response' to mitigating evidence in rendering its sentencing decision...the reasoning in Penry applies with equal force and effect to this case." App. Motion at 7-8. Mr. Jonson's motion for rehearing was denied on May 27, 1992.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS CAPITAL SENTENCING STATUTE UNCONSTITUTIONALLY PRECLUDED THE JURY FROM GIVING FULL MITIGATING EFFECT TO THE PETITIONER'S YOUTHFUL AGE AT THE TIME OF THE OFFENSE.

A. Introduction

The body of law developed by this Court leads to the

inescapable conclusion that youth is a paradigmatic mitigating factor when a sentencer seeks to decide whether a sentence of life or death is appropriate. This principle finds genesis in Gregg v. Georgia:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (e.g., his youth...)

Gregg v. Georgia, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (emphasis added).

A year later, in Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), youth was foremost among potential elements of mitigation in a capital sentencing proceeding:

> [The sentencer is constitutionally bound to consider circumstances] such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 637 (emphasis added).[1]

Lockett itself confirms the centrality of youth as a mitigating factor. Lockett v. Ohio, 438 U.S. 586 (1978). The Ohio capital sentencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore on three narrow questions. See id. at 607. This Court held that scheme unconstitutional

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[1] See also Sumner v. Shuman, 483 U.S. 66, 81-82 (1987) (quoting with approval Roberts' descriptive list of potential mitigating factors, and striking down Nevada statute imposing mandatory death penalty for prison murders committed by life-term inmates).

because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Id. at 608 (emphasis added).

When a majority of this Court endorsed Lockett in Eddings v. Oklahoma, 455 U.S. 104 (1982), it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of sixteen years at the time of the murder. ... The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 115-116 (all emphases added).[2] Justice O'Connor noted that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. Id. at 118 (O'Connor, J., concurring).

In 1989, this Court considered whether the Eighth Amendment

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[2] Even the dissenting Justices acknowledged that a young defendant's age is a mitigating factor which can, alone, support a sentence less than death. Eddings, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "either [Eddings'] youth or his family background was sufficient to offset the aggravating circumstances....") (emphasis added).

permitted the execution of seventeen-year-old capital defendants[3] at all; Justice Scalia rested this Court's holding that the Constitution erects no such per se bar on the condition that "individualized consideration is a constitutional requirement [in capital cases],... and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age."[4] Stanford v. Kentucky, 492 U.S. 361, 375

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[3] That is, persons who were seventeen years old at the time of the capital offense in question.

[4] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. See, e.g., Hill v. Lockhart, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"), cert. denied, 112 S.Ct. 344 (1991); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"), cert. denied, 455 U.S. 927 (1982); Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating), cert. denied, 465 U.S. 1084 (1984); State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"), cert. denied, ___ U.S. ___, 111 S.Ct. 2816 (1991); Brown v. Francis, 326 S.E.2d 735 (Ga. 1985), cert. denied, 474 U.S. 865 (1985); Finney v. State, 320 S.E.2d 147 (Ga. 1984), cert. denied, 470 U.S. 1088 (1985); State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration ... at the sentencing phase"), cert. denied, 469 U.S. 860 (1984); State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old), cert. denied, 488 U.S. 900 (1988).

(1989) (emphasis added).[5] Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle, and no Justice disagreed with it.

This consistent line of authority reflects a widely shared understanding about the mitigating value of youth and youthfulness that traces deep roots in Anglo-American society. Although under Texas law a seventeen-year-old is eligible for the death penalty,[6] jurisprudence, history, tradition, science, and common sense all teach that an adolescent may be less culpable for his actions than an adult. As noted above, this Court recognized in Eddings that

> . . . youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

455 U.S. at 115-116 (citation omitted).[7]

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[5] The traditional importance of youth as a mitigating factor is also reflected in the fact that "[t]wenty-nine states [specifically designate] the defendant's age as a mitigating factor in capital cases." Stanford, 492 U.S. at 375, 375 n. 5 (listing statutes).

[6] See Cannon v. State, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985) (capital sentence for defendant under eighteen years old not unconstitutional), cert. denied, 474 U.S. 1110 (1986); Ferguson v. State, 573 S.W.2d 516, 525 (Tex. Crim. App. 1978) (same), cert. denied, 442 U.S. 934 (1979).

[7] Scientific inquiry confirms this reasonable surmise, especially with respect to teenagers accused of murder. As one group of researchers has concluded,

> Young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes:
>
> > In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries.
>
> Erikson, Childhood and Society 261-263 (1963). They may be substantially impaired in their ability to control dangerous impulses:
>
> > Risk-taking with body safety is common in the adolescent years . . . [including, for example, teenagers'] car racing, excessive use of drugs and alcoholic beverages, and other similar activities . . . .
>
> Gordon, The Tattered Cloak of Immortality, in Corr and McNeil, eds., Adolescence and Death 16, 27 (1986). Indeed, young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may

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> Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive.

Lewis, Pincus, et. al. Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States (report prepared for presentation to the American Academy of Child and Adolescent Psychiatry) 11 (1987).

unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., The Meaning of Death 99, 104 (1959). In sum, "[t]he difference that separates [juveniles] from adults [is their] immature, undeveloped ability to reason in an adultlike manner." Streib, Death Penalty for Juveniles 3-20, 184-189 (1987).

This discussion demonstrates that youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case. However, the jury that sentenced Mr. Johnson was unable to voice the conclusion that Mr. Johnson's youth justified a life sentence notwithstanding the answers to the special issues.

B. The decision of the Court of Criminal Appeals is inconsistent with this Court's decision in Penry v. Lynaugh.

1. The Franklin and Penry Decisions

a. The Franklin decision

In Franklin v. Lynaugh, 487 U.S. 164 (1988), this Court rejected an "as applied attack" on the Texas capital sentencing scheme. Six justices, in two separate opinions, found that the second special issue adequately encompassed mitigating evidence of a good disciplinary record while in prison. Justice O'Connor, joined by Justice Blackmun, wrote a concurring opinion to express doubts about the Texas scheme, although she found no

constitutional problems with Franklin's sentence.

Citing Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 481 U.S. 393 (1987) for the proposition that "punishment should be directly related to the personal culpability of the criminal defendant," Franklin, 487 U.S. at 184, Justice O'Connor delineated the limit of a State's power to guide the discretion of a capital sentencer:

> [I]t is clear that a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.

Id. at 184-5. Justice O'Connor reasoned that Franklin's mitigating evidence of an absence of disciplinary violations was adequately contemplated within the scope of the second special issue. Furthermore, she found that, even if the jury was precluded from giving effect to this evidence to the extent it demonstrated positive character traits beyond the ability to exist peacefully in prison, "that limitation has no practical or constitutional significance... because the [evidence] had no relevance to any other aspect of petitioner's character." Id. at 185.

Although Justice O'Connor decided that a good prison record has no probative value beyond the scope of the special issues, she presaged her Penry opinion by addressing the issue of

mitigating evidence beyond the scope of or not relevant to the special issues:

> If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Id. at 185 (emphasis added). When mitigating evidence has no relevance to, or relevance beyond the special issues, a death sentence may be constitutionally unreliable, if the jury is not permitted to give effect to this mitigating evidence. Justice O'Connor intimated that unreliable sentences could result when a Texas defendant presents "[e]vidence of voluntary service, kindness to others, or of a religious devotion [that] might demonstrate positive character traits that might mitigate against the death penalty," id. at 186, or more generally, "facts about the defendant's character or background, or the circumstances of the particular offense that may call for a penalty less than death" id. at 188, irrelevant to or beyond the scope of the special issues.

b. The Penry Decision

This Court's holding in Penry v. Lynaugh addressed a constitutional infirmity in the application of the Texas capital sentencing statute. The Texas sentencing scheme, Tex. Code Crim.

Proc. Ann. Art. 37.071 (West 1990),[8] survived a facial challenge in Jurek v. Texas, 428 U.S. 262 (1976). Justice O'Connor's opinion for the Court in Penry held that the Texas statute, without a special instruction, operated to preclude the sentencer from considering and giving effect to Penry's mitigating evidence. The jury was not "provided with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision." Penry, 492 U.S. at 328. Relying on Eddings v. Oklahoma, the Court concluded that the lack of a "reasoned moral response" by the jury created the risk that the sentence of death was "imposed in spite of factors which may call for a less severe penalty." Id. This defect of process rendered the sentence unreliable to the extent it constituted a violation of the Eighth and Fourteenth Amendments of the Constitution.

Penry's mitigating evidence consisted of mental retardation and child abuse. In examining the first special issue, this Court determined that retardation was relevant to whether Penry had acted "deliberately,"[9] but that it also had relevance to his moral culpability beyond the special issue, because "[p]ersonal

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[8] The Texas code was amended in 1991, inserting language expressly instructing the jury to consider mitigating evidence introduced by the defendant when deliberating on the special issues. See Tex. Code Crim. Proc. Ann. Art. 37.071(2)(e) (West 1991).

[9] O'Connor, commenting on the fact that "deliberately" was not defined by either the legislature or the Texas Court of Criminal Appeals, understood the word to mean "something more than Penry was guilty of intentionally committing murder." Penry, 492 U.S. at 322.

culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Id. at 322. A rational juror could decide that Penry had acted deliberately, but was nonetheless "less morally 'culpable than defendants who have no such excuse.'" Id. Thus, this Court concluded that without an additional instruction

> defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's retardation...thus, we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence.

Id. at 323.

Examining Penry's evidence in the context of the second special issue, the Court found that evidence of abuse and retardation was only relevant as an aggravating factor. Because it suggested a "yes" answer to the question of future dangerousness, "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Id. at 324. However, the special issues provided no vehicle through which the jury could give mitigating effect to Penry's evidence.

This Court concluded that in order for a jury to give individualized consideration to a criminal defendant, it must be able to consider and give effect to any relevant mitigating evidence. In spite of the fact that a prosecutor has proven, beyond a reasonable doubt, that the answers to the special issues should be "yes," a jury must still be allowed to give effect to

mitigating evidence relevant to personal culpability that is not relevant to, or beyond the scope of, the special issues.

2. The state court failed to recognize that, similar to Penry's evidence of mental retardation and abuse, Mr. Johnson's youthfulness at the time of the crime has mitigating value beyond the scope of the special issues.

Mr. Johnson was nineteen at the time of the crime for which he was convicted and sentence to death. In rejecting Mr. Johnson's claim that the jury could not fully consider his age as mitigating under the special issues, the state court cited Lackey v. State, 819 S.W.2d 111, 134 (Tex. Crim. App. 1989). Lackey held that mitigating evidence of youth could be given effect under the second special issue. More importantly, the court held that this evidence would entitle Lackey to relief only if he demonstrated a connection between his age "and the facts and circumstances of his criminal acts in the instant case." Id.; see also id. at 134-35 (to gain relief, accused must show his age "somehow specifically reduced his blameworthiness for the murder. ...").

This analysis mirrors that of the en banc Fifth Circuit in Graham. See Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc). In Graham, the court held, like the state court in Lackey and Johnson, that "the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth." 950 F.2d at 1031. In addition, and again like the state court in Lackey and Johnson, the Fifth Circuit held

that "youth is not mitigating with respect to conduct not attributable to it. ... To the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness." Id.

The requirement that the accused demonstrate a nexus between the mitigating evidence of his youth and the crime for which he was convicted, imposed by both the state and federal courts, cannot be squared with the Eighth Amendment jurisprudence of this Court. Furthermore, in concluding youth can be given mitigating effect under the former Texas special issues, both the state and federal courts ignore the decidedly two-edged quality of youth, and thus overlook the strongest parallel between the mitigating evidence in Penry and the mitigating evidence in Johnson and Graham.[10]

This Court has expressly rejected the notion that a capital defendant's mitigating evidence must explain or excuse his offense in order to become constitutionally mitigating. For example, Boyde v. California, 494 U.S. 370 (1990), disproves the "nexus" thesis. Boyde upheld the challenged California jury

[10] The fact that Mr. Johnson was no longer a minor at the time of the offense is of no moment to the parallel between the cases. The Fifth Circuit in Graham expressly rejects the suggestion that its holding is based on Graham's status as a minor. "The salient factors which make 'youth' mitigating -- principally inexperience with resultant diminished judgment and self-control -- are all generally present among those in their early twenties...." Graham, 950 F.2d at n. 25. In addition, the court in Graham cited its prior opinion in DeLuna v. Lynaugh, 890 F.2d 720, 722 (5th Cir. 1989), as an illustration that the special issues "provide an adequate vehicle for the jury to take into account the defendant's youth." 950 F.2d at 1031. Carlos DeLuna, like Mr. Johnson, was of majority age at the time of the offense. Id.

instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 494 U.S. at 383 (emphasis added).[11]

In the same manner, Justice O'Connor's remarks in South Carolina v. Gathers, illustrate the Court's consistent definition of mitigating evidence, which countenances no "nexus" limitation:

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

[11] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." 494 U.S. at 378. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.

Gathers, 490 U.S. 805, 817 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting on other grounds) (emphasis added).

Finally, Payne v. Tennessee, ___U.S.___, 115 L.Ed.2d 720 (1991), compels the conclusion that "nexus" argument adopted by the state and federal courts are fundamentally out of step with this Court's Eighth Amendment cases. Payne upheld the State's presentation of "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part because "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." Payne, 115 L.Ed.2d at 733. This Court emphasized that such mitigating evidence "must be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. Id.; see also 115 L.Ed.2d at 735-736 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being related to the offense).

3. Without an additional instruction, the jury was unable to give its reasoned moral response to Mr. Johnson's youth.

In his closing argument at trial, Mr. Johnson argued that his youth mitigated against the imposition of the death penalty. S.F. vol. XV:434. Yet, without an additional instruction, the jury was unable to respond to Mr. Johnson's argument. The opinion of the state court below, like the opinion of the Fifth

Circuit in Graham, fails to appreciate the "two-edged" quality of youth under the former Texas sentencing scheme. Mr. Johnson's youth, like Mr. Penry's mental retardation, was "two-edged" in that it indicated a likelihood he would be dangerous in the future, even as it intuitively mitigated in support of a sentence less than death. See Penry, 492 U.S. at 324. As one judge on the Texas Court of Criminal Appeals has recognized,

> ... in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence -- such as a mental disease or defect, a deprived, abusive childhood or the youth of the defendant -- while mitigating against a death sentence in general, surely has tremendous specific probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); see also Eddings, 455 U.S. at 126 n.8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths do not, in fact, become less violent as they grow older).

Quite simply, youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time -- a more distant "time horizon" -- during which the young defendant may be dangerous, than if he were a mature adult. Because the lower court in this case, like the Fifth Circuit in Graham, erroneously held the opposite, however, it missed the strongest parallel between the evidence in this case and the mitigating evidence in Penry. Although Mr. Johnson's

youth had relevance to the second special issue as an aggravating circumstance, Mr. Johnson's youth mitigates against the death penalty in a manner not contemplated by the former Texas sentencing statute. For the reasons detailed above, youth is directly relevant to personal culpability, yet the former Texas sentencing scheme provides the jury with no vehicle to express their "reasoned moral response" to the mitigating evidence presented at trial.

Thus, a reasonable juror could have found Mr. Johnson's youth mitigated against the imposition of the death penalty. However, that juror may have simultaneously believed beyond a reasonable doubt, that Mr. Johnson would be a future danger to society. Without a vehicle for the jurors to vote for life despite their affirmative answers to the special issue questions, the jurors were provided no means with which they could express their "reasoned moral response" to whether Mr. Johnson should live or die.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF UNSETTLED LAW THAT ARE CURRENTLY BEFORE THE COURT IN GRAHAM V. COLLINS, CERT. GRANTED, 60 U.S.L.W. 3827 (JUNE 8, 1992).

On June 8, 1992, this Court granted certiorari in Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc), cert. granted, 60 U.S.L.W. 3827 (June 8, 1992). The two questions presented in Graham,[12] afford this Court with its latest opportunity to reach an issue litigated in two prior cases, Franklin v. Lynaugh, 487 U.S. 164 (1988), and Penry v. Lynaugh 492 U.S. 302 (1989). These two cases presented a specific question derivative of a larger perennial issue in this Court's jurisprudence regarding the constitutionality under the Eighth Amendment of any restrictions on the type of relevant mitigating evidence a capital sentencing jury could consider. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) (plurality); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Hitchcock v. Dugger, 481 U.S. 393 (1987).

In cases such as Lockett, the issue before this Court was simply whether or not a capital defendant could present "all relevant mitigating evidence" during sentencing. In Penry and Franklin, the specific question was whether Texas' capital

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[12] (1) "May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted 'deliberately' and might be dangerous in the future, and afford no other basis for taking his youth into account?"

(2) "May a State similarly limit the jury's consideration of such a defendant's positive character and unfortunate circumstances of his family background?"

sentencing statute (prior to its rewriting in 1991) allowed the jury to give proper mitigating "effect" to certain types of mitigating evidence offered by the petitioners during the sentencing phase.[13]

There is an important difference between the two lines of cases: in the former (e.g., Lockett) the issue was whether a State must permit a defendant to offer "any relevant mitigating evidence" to the sentencing jury; in the latter (e.g., Penry), the issue was to what degree a State a may "guide" the jury's consideration of relevant mitigating evidence. See Penry, 492 U.S. at ___ (Scalia, J., dissenting). While the issue presented in Graham and in the instant case may appear only to ask whether a State may guide a capital sentencing jury's consideration of mitigating evidence, Mr. Johnson argues that at least with respect to certain types of mitigation evidence, the issue is whether such mitigating evidence may be presented for the jury's consideration at all. Even the dissenters in Penry agreed that

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[13] This Court first addressed and upheld the facial constitutionality of the Texas death penalty statute in Jurek v. Texas, 428 U.S. 262 (1976). The holding was predicated on the assumption that the Texas sentencing scheme would allow "the defense to bring before the jury whatever mitigating circumstances relating to the individual can be adduced." Id. at 276. The Jurek Court also noted, however, that the Texas statute "does not explicitly speak of mitigating circumstances." Id. at 272. Notably, the Court recognized that the first and third special issues had not yet been construed by the Court of Criminal Appeals. It ultimately concluded in Jurek that the constitutionality of the Texas sentencing scheme would turn on "whether the enumerated questions allow consideration of particularized mitigating factors." Id.

Cases such as Franklin, Penry, Graham, and the instant case are as-applied attacks on the statute.

such a claim, if true, would be meritorious. See id. at ___ ("Of course there remains available ... the contention that a particular mitigating circumstance is in fact irrelevant to any of the ... [pre-1991] special issues, and hence could not be considered.").

At least with respect to the issue of whether a State may "guide" a jury's consideration of relevant mitigating evidence, there are two sub-issues contained in this broader question discussed in Penry. The first is whether the enumerated "special issues" asked in Tex. Code Crim. Pro. Art. 37.071, prior to its 1991 amendment,[14] allow a jury to give full mitigating effect to all of the possible significant ways that a certain type of mitigating evidence may be relevant to the jury's "reasoned moral response" in reaching a sentencing decision. Certain mitigating evidence will have independent mitigating significance beyond the scope of the narrow questions asked by the special issues. See Penry, 492 U.S. at 319, 321; Franklin, 487 U.S. at 186 (O'Connor, J., concurring). The purported "guiding" by the State of the jury's consideration of relevant mitigating evidence amounts to the type of outright exclusion declared unconstitutional in numerous post-Lockett cases. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (unconstitutional to keep from capital sentencing jury's consideration "nonstatutory" mitigating evidence offered at trial).

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[14] The pre-1991 version of Art. 37.071 governed petitioner's trial, which occurred in July of 1986.

The second sub-issue is whether a certain type of mitigating evidence qualifies as a "two-edged sword," Penry, 492 U.S. at 324: that is, while the particular evidence may be relevant as aggravating under one or more of the special issues, it may have a mitigating facet beyond the purview of any of the special issues. A quintessential "two-edged sword," mental retardation, was at issue in Penry. As the Court noted, our society recognizes that circumstances of any murder should be mitigated by the fact that the murderer was mentally retarded; however, a rational Texas jury would be more likely to answer the second pre-1991 special issue (regarding future dangerousness) affirmatively in view of the fact that a mentally retarded person is obviously less amenable to rehabilitation than a non-retarded person.

Graham seeks to apply the teachings of Penry to three categories of mitigating evidence: a capital defendant's relative youth at the time of the crime (the petitioner in Graham was seventeen); a defendant's "positive character traits"; and a defendant's "unfortunate circumstances of his family background."

At least one of the three types of mitigating evidence in Graham are directly implicated in Mr. Johnson's case: youthful age. Because of the overlapping issues in the two cases, this Court should defer consideration, as it has in other cases, of Mr. Johnson's petition until the disposition of Graham. See Kelly v. Texas, petition for cert. filed, No. 92-5182, ____ U.S. ____ (1992)(stay of execution entered pending disposition of

petition writ of certiorari raising Graham and Penry); Holland v. Collins, petition for cert. filed, No. 92-5088, ____ U.S. ____ (1992)(stay of execution entered pending disposition of petition for writ of certiorari raising Graham and Penry); Granviel v. Texas, petition for cert. filed, No. 91-8435, ____ U.S. ____ (1992)(execution stayed, case conferenced with no decision and no further conference date scheduled); Richardson v. Texas, petition for cert. filed, No. 91-6745, ____ U.S. ____ (1992)(conferenced with no decision and no further conference date scheduled); Jackson v. Texas, petition for cert. filed, No. 91-5862, ____ U.S. ____ (1992)(same); Earhart v. Texas, petition for cert. filed, No. 91-8105, ___ U.S. ____ (1992)(same). This Court's decision in Graham will surely have a bearing on the proper resolution of Mr. Johnson's case.

III. THE COURT OF CRIMINAL APPEALS ERRED BY AFFIRMING THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE A JUROR WHO STATED THAT SHE WOULD NOT CONSIDER YOUTH AS A MITIGATING FACTOR AT THE SENTENCING PHASE.

> Any juror to whom mitigating factors are...irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Morgan v. Illinois, 112 S.Ct. 2222, 2235 (1992).

Mr. Johnson was sentenced to die by a jury that included three individuals who would not consider youth as a mitigating factor at the sentencing phase of Mr. Johnson's trial. The Texas Court of Criminal Appeals affirmed the trial court's refusal to excuse juror Kiker for cause despite each of their statements

that they would not view youth as a mitigating.[15] The court stated "it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of 'mitigating evidence' any consideration." (Johnson v. State, 773 S.W.2d 322, 331 (Tex. Crim. App. 1989) (citations omitted). Therefore, the court concluded, "[t]he mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight does not create a sustainable challenge for cause...." Id.

Prior to Morgan, other state courts held that jurors who could not consider certain kinds of mitigating evidence, such as youth, must be excluded for cause. See, e.g., State v. Bey, 548 A.2d. 887, 902 (N.J. 1988) (juror should have been excused for cause "[n]otwithstanding [the juror's] assertion that he would consider the evidence in mitigation, his capacity to deliberate impartially was 'substantially impaired' by his belief that 'if it's a violent crime I think a man should be put to death'"); Brewer v. Arkansas, 608 S.W.2d 363 (Ark. 1980) (trial court erred in refusing to excuse for cause two prospective jurors who could not consider age and/or other mitigating factors). In addition to the merits of this issue, this Court should grant certiorari to resolve the conflict created by the Texas Court of Criminal

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[15] Following the voir dire testimony of the three jurors in question, defendant challenged each one for cause. In each case, that challenge was overruled. In each case, defendant had exhausted his peremptory challenges, and asked the court to grant an additional peremptory challenge to strike the juror who was unsuitable and objectionable to the defendant. In each case that request was denied.

Appeals' divergent holding regarding the constitutionality of not excusing for cause jurors who refuse to consider all mitigating evidence at the punishment phase.

To satisfy the protections granted to Mr. Johnson by the Sixth and Eighth Amendments, any juror that sits on the capital trial of a nineteen year old youth must agree to consider evidence of youth as a mitigating circumstance at the sentencing stage if the facts of a particular case warrant it. In Dorsie Johnson's case, however, at least one juror categorically stated at voir dire that she would not consider youth as a mitigating circumstance. She concluded ex ante that youth would not factor into her sentencing equation, regardless of the development of the facts at trial, and thus "formed an opinion concerning the merits of the case without basis in the evidence at trial." Morgan, 112 S.Ct. at 2235. Such a jury violates the most essential of Sixth Amendment requirements: "[t]he requirement that 'a jury's verdict must be based upon the evidence developed at the trial ' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. Louisiana, 85 S.Ct. 546, 549 (1965).

Denied a jury that regarded youth as a relevant mitigating circumstance, Dorsie Lee Johnson faced sentencing by a jury that refused to factor into its sentence one of the fundamental aspects of Eighth Amendment jurisprudence regarding the role of mitigating evidence. This court has stated this principle clearly and unequivocally:

> Our cases explicating the role of mitigating evidence in capital sentencing have rigorously enforced one rule: A sentencing jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence of death. That rule does not merely require that the jury be allowed to hear any such evidence that the defendant desires to introduce, Skipper v. South Carolina, 476 U.S., at 4, 106 S.Ct., at 1670; Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S.Ct., 1821, 1822, 95 L.Ed.2d 347 (1987), it also requires that the jury be allowed to give "independent mitigating weight" to the evidence. Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1973); Eddings v. Oklahoma, 455 U.S. 104, 112-113, 102 S.Ct. 869, 875-876, 71 L.Ed.2d 1 (1982).

Franklin v. Lynaugh, 487 U.S. 164, ___ (1988) (O'Connor, J., concurring).

Dorsie Lee Johnson's jury could give no independent mitigating weight to his youth, as at least one of its members had stated prior to trial that youth would not be considered as a mitigating circumstance at sentencing. Indeed, when questioned regarding the defendant's youth at voir dire, juror R.E. Barbee stated that he didn't think "[Dorsie Johnson's] age would make any difference." S.F. vol.IX:3668. Thus, although the jury was allowed to hear testimony regarding Dorsie's age, they were never in a position to give it full and fair consideration and were not "impartial" in the sense required by the Sixth Amendment.

The jury that sentenced Dorsie Johnson to death was unable to give the "reasoned moral response" to the defendant's youth as required by the Eighth Amendment. See California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Members of the jury failed to undertake the requisite "individualized assessment

of the appropriateness of the death penalty" as a "moral inquiry into the culpability of the defendant," Id. Implied within a true "reasoned, moral response" is the consideration of youth as a mitigating factor; Dorsie Johnson's jury began its deliberations absent the ability to figure youth into the complex calculus that eventually called for the death of a nineteen year old boy.

This court has determined that as a matter of law the state may not statutorily preclude the sentencer from considering any mitigating factor. Although the sentencer may determine the weight given to youth as a mitigating factor, "they may not give it no weight by excluding such evidence from their consideration." Eddings v. Oklahoma, 102 S.Ct. 869, 877 (1982) (Powell, J.). The presence of three jurors who state before trial that they will exclude youth as a mitigating factor from their consideration by assigning youth a pre-set value of zero is a violation of Dorsie Johnson's Sixth and Eighth Amendment rights, applicable to the state of Texas through the fourteenth amendment. Because juror Kiker said that she would, in effect, assign no weight to youth as a mitigating factor, she was not able to apply the law and should have been excused for cause. Dorsie Johnson was sentenced by a jury that was not impartial under the Sixth Amendment. This Court should grant certiorari and vacate Mr. Johnson's sentence.

Conclusion

Petitioner Dorsie Lee Johnson respectfully requests this

Court to grant relief on the issues raised herein by vacating his sentence and remanding the case for a new trial. In view of the similarity between the two cases, Mr. Johnson's case should be consolidated with Graham v. Collins, or in the alternative, held for later consideration following the disposition of Graham.

Respectfully submitted,

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Dorsey Lee JOHNSON, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 69750.

Court of Criminal Appeals of Texas, En Banc.

June 21, 1989.

Defendant was convicted in the 132nd Judicial District Court, Scurry County, Gene L. Dulaney, J., of capital murder, and he appealed. The Court of Criminal Appeals, McCormick, P.J., held that: (1) trial court did not abuse its discretion in denying motion for change of venue, and (2) trial court did not abuse its discretion in determining challenges of veniremembers for cause.

Affirmed.

Clinton, J., joined only the judgment of the court.

Teague, J., dissented.

1. Criminal Law ⇐1150

When motion for change of venue has been denied, standard of review to be applied by appellate courts is whether, after review of record, evidence reflects trial court abused its discretion in refusing the motion; this abuse of discretion must be determined in light of whether outside influences affecting community climate concerning particular defendant were inherently suspect. Vernon's Ann.Texas C.C.P. art. 31.03.

2. Criminal Law ⇐126(1)

Merely because case is publicized is not, in and of itself, sufficient reason to change venue—venire need not be completely ignorant of facts and circumstances which surround particular case. Vernon's Ann.Texas C.C.P. art. 31.03.

3. Criminal Law ⇐134(4)

Where period of time has passed between publicity complained of and time of trial, such delays tend to negate inference that publicity would affect climate of opinion in community and justify change of venue. Vernon's Ann.Texas C.C.P. art. 31.03.

4. Criminal Law ⇐1150

Where evidence is not sufficient to show that in the community there existed pervasive feeling that ability of movant to receive fair trial by impartial jury was doubtful, then decision rendered by trial court to deny motion for change of venue will not be disturbed on appeal. Vernon's Ann.Texas C.C.P. art. 31.03.

5. Criminal Law ⇐126(1)

Trial court did not abuse its discretion in denying motion for change of venue of capital murder trial; there was no demonstration that publicity was anything other than accurate reporting. Vernon's Ann. Texas C.C.P. art. 31.03.

6. Criminal Law ⇐1134(5)

In making determination as to propriety of rulings on challenges for cause of veniremembers for already forming conclusion as to guilt, court will review and determine if trial court abused its discretion in light of entire examination of veniremember; that is, whether record reflects evidence tends to reasonably support trial court's implied findings that veniremember would be able to perform tasks that are assigned to jurors. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

7. Jury ⇐103(6)

Evidence that prospective juror in capital murder prosecution would render verdict based upon evidence adduced at trial supported trial court's finding that juror was qualified despite contention that juror had already formed conclusion as to guilt. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

8. Jury ⇐132

Evidence was sufficient to support trial court's determination in capital murder trial that prospective juror's beliefs in favor of capital punishment would not substantially impair her abilities as juror. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

9. Criminal Law ⇐1152(2)

In determining whether potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if trial court abused its discretion in its action regarding veniremember in light of the record; only where record supports trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of instructions and oath will decision made by trial court be undisturbed on appeal. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

10. Jury ⇐108

Mere fact that prospective juror in capital murder case states that they would not, under any circumstances, answer punishment questions in the affirmative for any reason, is not in and of itself sufficient to disqualify juror. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

11. Jury ⇐108

Trial court did not abuse its discretion in capital murder trial in excusing for cause veniremember whose opposition to capital punishment likely would have made him balk at deciding punishment issues or falsify his answers. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 1.

12. Criminal Law ⇐1152(2)

Review of trial court's decision on sufficiency of excuses for not serving as juror shall be whether decision constituted abuse of discretion; where record reasonably reflects tendency to support trial court's holding, decisions as to sufficiency of excuses and propriety of excusals rendered by trial courts shall not be disturbed on appeal. Vernon's Ann.Texas C.C.P. art. 35.03.

13. Jury ⇐75(1)

Trial court did not abuse its discretion in excusing for cause veniremember who stated that she would have difficult time keeping her mind on trial lasting one to four weeks because of her concern for the grandson she was caring for. Vernon's Ann.Texas C.C.P. art. 35.03.

14. Jury ⇐107

It is not error for trial court to overrule challenge for cause where it is shown that juror will not or may not give particular variety of mitigating evidence any consideration. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

15. Jury ⇐107

Mere fact that prospective juror, during voir dire, acknowledges that in their mind evidence deserves little or no weight does not create sustainable challenge for cause. Vernon's Ann.Texas C.C.P. art. 35.16(b), pars. 1, 3, (c), par. 2.

16. Jury ⇐107

Trial court did not abuse its discretion in capital murder prosecution in finding that juror, who stated she would not consider mental or physical age as mitigating factor at punishment, was disqualified. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

17. Jury ⇐132

Evidence supported finding of trial court in capital murder prosecution that veniremember was not qualified because she could not satisfy statutory requirement of having ability to read and write. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 11.

Frank W. Conard, II, Sweetwater, for appellant.

Ernie B. Armstrong, Dist. Atty., Snyder, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

McCORMICK, Presiding Judge.

This is a direct appeal from a conviction of capital murder. V.T.C.A., Penal Code, Section 19.03(a)(2). Appellant was convicted of intentionally causing the death of Jack Huddleston in the course of committing and attempting to commit the offense of robbery. Upon finding appellant guilty of capital murder, the jury affirmatively

answered the special issues under Article 37.071(b)(1) and (2), V.A.C.C.P. Punishment was then assessed at death. We will affirm.

Appellant alleges seven points of error which we will address in the order in which they arose at trial. Appellant does not assert any sufficiency challenges, therefore, recitation of the facts is not required. We do, however, find a brief synopsis of the events which occurred in March 1986, appropriate.

In the early morning hours of Sunday, March 23, 1986, appellant and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime, deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, appellant lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. Appellant then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one hundred sixty dollars). Two cartons of cigarettes were also taken.

Appellant was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that appellant confessed to the capital offense committed in Snyder.

In his seventh point of error, appellant alleges that the trial court erred in failing to grant his motion for change of venue. Appellant asserts that the pretrial publicity of his case prevented him from receiving a fair trial, the result of which denied him the right to equal protection and due process. See Article 31.03, V.A.C.C.P.

[1] When a motion for change of venue has been denied the standard of review to be applied by appellate courts is whether after review of the record the evidence reflects the trial court abused its discretion in refusing the motion. *Phillips v. State*, 701 S.W.2d 875 (Tex.Cr.App.1985) cert. denied 477 U.S. 909, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986). This abuse of discretion must be determined in light of whether outside influences affecting the community climate concerning a particular defendant were inherently suspect. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Phillips*, 701 S.W.2d at 879.

[2, 3] Merely because a case is publicized is not, in and of itself, a sufficient reason to change venue—a venire need not be completely ignorant of the facts and circumstances which surround a particular case. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Eckert v. State*, 623 S.W.2d 359 (Tex.Cr.App.1981) (overruled on other grounds by *Reed v. State*, 744 S.W.2d 112 (Tex.Cr.App.1988)). A further factor to be considered is the passage of time. Where a period of time has passed between the publicity complained of and the time of trial, such delays tend to negate the inference that publicity would affect the climate of opinion in a community. *Nethery v. State*, 692 S.W.2d 686 (Tex.Cr.App.1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Adami v. State*, 524 S.W.2d 693 (Tex.Cr. App.1975).

[4] Therefore, where the evidence is not sufficient to show that in the community there existed a pervasive feeling that the ability of the movant to receive a fair trial by an impartial jury was doubtful, then the decision rendered by the trial court to deny such a motion will not be disturbed on appeal. *Beets v. State*, 767 S.W.2d 711, 742 (Tex.Cr.App.1988).

[5] In October, 1986, a hearing was held on appellant's motion for change of venue. Accompanying appellant's motion were ten affidavits from residents of Scurry County. In each affidavit, the affiant swore that in their opinion appellant could not receive a fair trial in the community. However at the hearing, the seven compurgators which appeared testified on cross-examination, that they had changed their minds and now thought appellant could receive a fair trial. In additional support of his motion, and aside from the affidavits attached thereto, appellant introduced into evidence, through several representatives of the local media, news articles printed in newspapers and heard on the radio in Scurry County. The coverage consisted of some 14 to 16 articles of various sizes covering a variety of topics from the actual murder at the time it occurred to a suppression hearing held shortly before the change of venue hearing and selection of the jury.

The State pointed out through cross-examination of these witnesses that the reporting of the case was fair, non-inflammatory and for the purpose of informing the public of a current event. These witnesses also testified that they believed appellant could receive a fair trial.

The State brought forth seven witnesses from various areas of the county who testified that they had not heard any or at least had heard only very little discussion about the case since its occurrence in March. The media coverage had little effect on them or on any of the people they knew. Additionally, these witnesses testified that it was their opinion that appellant could receive a fair and impartial trial from a jury made up of Scurry County residents. At the close of evidence and final statements the trial court denied appellant's motion for change of venue.

In reviewing the testimony adduced at the hearing we find that the evidence supports the decision made by the trial court. The record reflects that the type and fashion of reporting was not of the requisite character as to create a suspect environment which would prevent the rendering of a fair trial, thereby depriving appellant of equal protection and due process of law.

Here it was not demonstrated that the publicity was anything other than an accurate reporting of an unusual occurrence in Scurry County. There was no evidence of any prejudicial or inflammatory remarks made in any of the articles. Additionally, the publicity complained of herein took place over the course of more than six months since the murder and nearly six months since appellant's arrest.

Therefore, the trial court did not abuse its discretion in denying the motion for change of venue. As a result, appellant's seventh point of error is overruled.

Appellant, in his second point of error, alleges that the trial court committed error in denying his challenge for cause of veniremember Nachlinger. Appellant asserts that Nachlinger had already formed a conclusion as to appellant's guilt. See Article 35.16(a)(10), V.A.C.C.P.

[6] In making a determination as to the propriety of rulings on challenges for cause of this variety, the Court will review and determine if the trial court abused its discretion in light of the entire examination of the veniremember. That is, whether the record reflects the evidence tends to reasonably support the trial court's implied findings that the veniremember would be able to perform the tasks that are assigned to jurors in this State. See *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988).

Nachlinger testified that he would follow the law as proscribed by the oath and would render a verdict based solely upon the evidence presented at trial. Nachlinger understood the concept of proof beyond a reasonable doubt and would require the State to provide that proof, otherwise he would return a verdict of not guilty.

During the State's voir dire examination the following colloquy took place regarding the prospective juror's feelings on presumption of innocence:

"Q. [Prosecutor] Do you understand that that indictment is not evidence that he is guilty. It cannot be used or even considered to be evidence that he is guilty?

"A. Yes, sir.

"Q. Do you understand that?

"A. Yes.

"Q. Having been charged with that offense, it merely means that we can go to trial and try to prove our case. He is presumed innocent and will remain innocent and presumed innocent until such time as the State produces evidence which shows beyond a reasonable doubt that he is guilty.

"A. Yes, sir.

"Q. All right. Do you have any problems with the presumption of innocence that the law affords to any individual?

"A. No, sir. That's fair.

"Q. Would agree you would afford that presumption to this defendant? You have not yet determined in your own mind because you have not heard any evidence and you understand the principle that he is presumed innocent at this time as he sits here in the Courtroom. He is innocent and he is not guilty because there has been no proof.

"A. Yes."

During appellant's voir dire examination, Nachlinger was asked about an answer he entered on his questionnaire regarding his personal philosophy, in which he wrote, "[t]he man killed another man who was holding down an honest job. I see little need in a trial." When asked whether he remembered specifics about the crime he said he did not, except that he had heard there was a confession and that is why he had written in that response. When questioned further on his feelings regarding appellant's guilt or innocence the following transpired:

"Q. [Appellant] In your heart now—this is not an abstract thing, but how do you really feel inside?

"A. Well, if you know—if I was listening to this and reading what I have read, if he can be proven otherwise, you know, I'm not completely ironed in on one thing anywhere, but, you know, I have been known to change my mind and I can do it. You know, I'm willing to listen to anything. But, like I say, you know, didn't sound real good.

"Q. Well, again, what you say, if it can be proven otherwise, that is—and you said that you heard that he gave a confession and you have heard people talking about and you have heard that it was a cinch deal and what that kind of tells me is that you must have felt that at some point or at least when you wrote this paper out that Dorsie Johnson must be guilty of this. Is that how you felt when you—I mean just general feelings inside and not thinking about what the State has to prove and this and that, but just how you actually felt?

"A. Well, sir, I suppose so.

"Q. Is that—I suppose so. Do you think that that is really an accurate answer: yes or no?

"A. Yes, sir.

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"Q. Do you think that that conclusion and that idea that you have already set up in your mind and expressed by even saying, 'I see little need in a trial,' you think that would influence your actions and your deliberations and your decision if you were on the Jury?

"A. Well, I hope it wouldn't, but I'm sure it probably could.

"Q. In other words, are you saying—

"A. Yes, sir, I think I could. I don't know, you know.

• • • • • •

"A. Well, you know, you say I have formed a conclusion here. If I was going to take what I have already read and just, you know, pass a verdict now, it would probably be a guilty verdict. But if I was to get on this deal here and, you know, I mean that's not a cut and dried thing in my mind right now, you know. I believe I could go in here open minded, you know. I'd try to do it the best I could.

• • • • • •

"Q. Honestly and from your feelings and not from abstract ideas, but just from your heart?

"A. Well, I'm—you know, I know what you're getting at here. I know what I wrote down on the questionnaire and all, but, well—you know, you just kind of leading it around and I feel like I've told you now two or three times, but I don't really know how to go ahead and tell you is what I'm getting at. I feel like I've already told you this a couple of times, you know. I don't know really what you're hunting or pushing on here.

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"Q. Do you understand that if a person—if those conclusions from a person or yourself or any Juror influences their decision—in other words, if it caused you to say, well, I think he is guilty, but if he can convince me he is not, you understand that person would have the duty not to be on that Jury?

"A. Yes, sir.

"Q. And do you feel that you would fit that category because of that reason? [No response]

"Q. Of course, there is nothing wrong with it if you fit that category and because you have read all of those things or heard people talking about them, there is nothing wrong with that. If you feel that you would, then that is what I would like to know.

"A. Yes, sir. I believe it could have some effect on my judgment.

"Q. You think—I hate to keep pushing. You say it could have. Do you think it would have?

"A. Yes, sir."

It was at this time that appellant challenged veniremember Nachlinger for cause on the ground that Nachlinger had already formed an opinion as to appellant's guilt. Article 35.16(a)(10), V.A.C.C.P. The judge overruled the challenge and allowed further questioning by the State which drew another objection from appellant in that pursuant to Article 35.16(a)(10), supra, no further questioning should be allowed.[1] This objection was overruled[2] and examination by the State continued in part as follows:

"Q. [Prosecutor] All right. Now, then, do you know anything—know anything that tells you beyond a reasonable doubt at this time that Dorsie Johnson is the one that committed this crime?

"A. No, sir.

"Q. And would you require the State, that is me and my witnesses, to prove to you beyond a reasonable doubt that this Dorsie Johnson is the one that committed the crime before you found this Dorsie Johnson guilty?

"A. Yes, sir. It'd have to be proven to me."

[7] Nachlinger stated that the State would have to prove appellant's guilt beyond a reasonable doubt, that he understood the presumption of innocence and would abide by it and that he would render a verdict based upon the evidence adduced at trial. There is sufficient evidence in the record to support the trial court's implied finding of fact that Nachlinger was a qualified juror. Therefore, the trial court did not abuse its discretion in overruling appellant's challenge for cause. *Nethery v. State*, 692 S.W.2d 686 (Tex.Cr.App.1985) cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Barefoot v. State*, 596 S.W.2d 875 (Tex.Cr.App.1980) cert. denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981). Appellant's second point of error is overruled.

[8] In appellant's sixth point of error he alleges that the trial court erred in denying his challenge for cause as to veniremember Bruner. Appellant alleges that Bruner could not consider a life sentence in a capital case and as a result demonstrated a prejudice against the law applicable to appellant and upon which he was entitled to rely. Article 35.16(c), (2), V.A.C.C.P.

The standard of review in these circumstances turns on whether the trial court abused its discretion by overruling the challenge for cause. In determining abuse of discretion, this court shall review the

1. Appellant also objected based on Article 35.16(a)(8), which allows for the discharge of a veniremember due to the fact "he had served on a petit jury in a former trial of the same case." There is no evidence in the record to support such an objection nor is this raised in appellant's appeal. Therefore, we need not determine its validity.

2. Appellant raises the failure of the trial court to suspend examination and discharge Nachlinger pursuant to Article 35.16(a)(10), as a part of his second point of error being discussed herein. Although Nachlinger was "unequivocal" in one particular response, when viewed in the context of the preceding examination, the record reflects that Nachlinger was anything but "unequivocal" as to whether, in his opinion, the conclusion regarding appellant's guilt would influence his verdict. Therefore, the trial court did not err in allowing further questioning.

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record and determine if it supports the trial court's implied finding that the prospective juror's views would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath." *Cockrum v. State*, 758 S.W.2d 577 (Tex.Cr.App.1988) cert. denied — U.S. ——, 109 S.Ct. 1358, 103 L.Ed.2d 825 (1989); *Hernandez*, 757 S.W.2d at 752.

The examination of Bruner regarding the imposition of sentence revealed that Bruner would not automatically vote "yes" when answering the punishment questions because not every murder deserved the death penalty, although she felt that a capital crime deserved the death penalty. She stated that she would wait to hear all of the evidence presented at punishment before determining the answers to the punishment questions.

During appellant's examination, Bruner was asked if she would answer the punishment questions "yes" so appellant would receive the death penalty which Bruner had stated was the only proper punishment for a capital crime. To this she responded:

"A. I'll put it like—if I answered all of these yes because the State proved it, I would answer them all yes.... [b]ut if it is not proven to me to answer all of these yes, I'll put one no, yes, or maybe two, whatever. Right now I can't answer that, really."

On further examination by the State, Bruner reiterated that as to the punishment questions, she would not automatically answer them "yes" thereby disregarding the evidence presented. She understood her oath and stated that she would not violate it just so the death penalty could be imposed.

The court, in an effort to clear up any ambiguities in her answers regarding punishment engaged in the following discussion:

[Trial court]

"Q. You would still vote no? Would you still vote no knowing it would possibly be life if you voted no?

"A. Right.

"Q. If it was [sic] failed to be proven to you that it should be yes, could you vote no?

"A. On the second phase—yes, on the second phase. Yes, sir, if its proven.

• • • • • •

"Q. You haven't answered my question. Could you vote no if it was not proven to you that—

"A. Yes.

"Q. —that you can vote yes—

"A. Yes, I could vote no.

"Q. You would do that if the evidence did not show it to be yes?

"A. Yes, sure, I would."

Based on the totality of the voir dire, it is evident that Bruner would listen to all of the evidence, put her personal feelings aside, and answer the punishment questions based upon that evidence. Although, she initially would have answered the questions "yes" if appellant were found guilty, after the veniremember understood the process involved she testified that she would listen to the evidence provided at the punishment phase and would answer the special issue questions on punishment accordingly. As a result, there is sufficient evidence in the record to support the trial court's determination that Bruner's beliefs would not substantially impair her abilities as a juror in light of the instructions and oath. *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988). The trial court, therefore, did not abuse its discretion in overruling appellant's challenge for cause of veniremember Bruner. Appellant's sixth point of error is overruled.

Appellant's fourth point of error alleges that the trial court erred in sustaining the State's challenge for cause of veniremember Graves. Appellant asserts that it was not sufficiently shown that Graves would automatically answer the punishment questions in the negative. See Article 35.16(b)(1), (3), V.A.C.C.P.

[9] In determining whether a potential juror was properly excused for cause due to his or her views on capital punishment, it must be determined if the trial court abused its discretion in its action regarding the veniremember in light of the record. Only where the record supports the trial court's determination that those views would prevent or substantially impair that veniremember's duties in light of the instructions and oath, will the decision made by the trial court be undisturbed on appeal. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988); *Sharp v. State*, 707 S.W.2d 611 (Tex.Cr.App.1986) cert. denied, — U.S. ——, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988).

In the present case, after having had the process explained to him, Graves stated that regardless of what the evidence proved he would answer one of the punishment questions "no" so as to not be a participant in the rendering of a death sentence. Graves, in his responses, went on to illustrate that if faced with such a decision as between the oath and his conscience, he would prefer not to take the oath rather than swear to perform a duty which he could not undertake.

During examination by appellant, Graves stated that he would follow the law in deciding the three punishment issues. Subsequently appellant was asked the following question:

"Q. Okay. I kind of keep going back, I guess, to the answers of the—if you were a Juror and asked to deliberate on the punishment on a capital crime, again, it would be in the instance where a person was convicted of a capital crime and you were talking about punishment and that being punishment set by the answers to these three questions, could you, in fact, follow your oath to listen to the evidence and decide on the evidence and weigh the evidence and then put an answer—then go ahead and answer these three questions as the evidence indicated?

"A. Yes, but if it meant answering yes to all three, I couldn't because I really don't feel like the death penalty is appropriate."

[10, 11] The mere fact that a prospective juror states that they would not, under any circumstances, answer the punishment questions in the affirmative for any reason, is not, in and of itself, sufficient to disqualify a juror. *Hernandez v. State*, 757 S.W.2d 744 (Tex.Cr.App.1988). However, after review of the record we find that it clearly reflects a "substantial likelihood that [Graves would] balk at the task or falsify an answer" and therefore the trial court committed no error in finding that Graves was unqualified to be a juror. *Id.* It is evident that Graves' views on crime and punishment would substantially impair his abilities to carry out his duties as a juror in accordance with the oath and instructions necessitated by Texas law. *Id.* at 754. Therefore, as the trial court committed no error, appellant's fourth point of error is overruled.

Appellant in his first point of error alleges that the trial court *sua sponte* excused veniremember Walker over his objections and without a challenge for cause by either party.

Although this is true, appellant mischaracterizes the trial court's action by calling it a *"sua sponte"* excusal. Cf. *Green v. State*, 764 S.W.2d 242 (Tex.Cr.App.1989); *Nichols v. State*, 754 S.W.2d 185 (Tex.Cr.App.1988) cert. denied, — U.S. ——, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); *Rougeau v. State*, 738 S.W.2d 651 (Tex.Cr.App.1987) cert. denied — U.S. ——, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976) cert. denied 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). The Texas Code of Criminal Procedure provides that once a juror is sworn to answer truthfully to the questions to be asked during voir dire, "the court shall then hear and determine excuses offered by prospective jurors for not serving as a juror and if sufficient, discharge those members of the venire." Articles 35.02 and 35.03, V.A.C.C.P.

In the case before us, the State, in the course of examining Walker, inquired into several matters including whether she had responded affirmatively to a question regarding the care and custody of a child

under the age of ten years. Walker explained that the child was her grandson and that he stayed with her during the school year so he may attend school locally rather than in Grand Prairie where his mother lived.[3] She stated that he was eight years old and was currently being cared for by a friend while she was at the courthouse for this proceeding. The attorneys elicited from Walker that although her friend could care for the child during the course of the trial and although she characterized her grandson as very independent, if the trial lasted for the expected one to four weeks, she would have a difficult time keeping her mind on the trial. She stated that she wanted to do her civic duty and would like to be on a jury for a trial that would not be so lengthy. Veniremember Walker also stated that if she were a defendant in a criminal trial she would not want a juror who had her state of mind sitting on her jury panel.

The court then told Walker that if she wanted to be excused for these reasons that he would excuse her, if however, she wanted to serve on this jury then she may as she was qualified. The veniremember chose not to serve and asked to be excused. The court excused Walker, expressly pursuant to Article 35.03, over appellant's objection.

The objections raised by appellant began with an assertion that the trial court and prosecutor were seeking to exclude Walker because she was black, the same race as the appellant. That the testimony elicited by the State was intended for the sole purpose of having this veniremember excused because she was black. Additionally, appellant objected to the fact that the trial court was excusing her when there was no valid challenge for cause from either party and that the court was doing so based on her testimony which appellant felt was not sufficient to justify her excusal. We disagree.

[12, 13] As previously set out, Article 35.03 provides that it shall be the court that hears and determines the sufficiency of excuses for not serving as a juror. As the legislature has placed this responsibility and discretion upon the trial judges of this state, review of their decisions on appeal shall be whether such a decision constituted an abuse of discretion. That is, does the record reasonably reflect a tendency to support the trial court's holding. Where the record so reflects, decisions as to the sufficiency of excuses and the propriety of excusals rendered by trial courts shall not be disturbed on appeal. However, we feel that the exercise of this authority by trial judges should be jealously guarded and relied upon, not by the parties, but by the judges as a last resort for excusing, what would otherwise be, a proper juror. *Cf. Nichols v. State*, 754 S.W.2d 185 (Tex.Cr.App.1988) cert. denied, — U.S. —, 109 S.Ct. 819, 102 L.Ed.2d 808 (1989); *Rougeau v. State*, 738 S.W.2d 651 (Tex.Cr.App.1987) cert. denied — U.S. —, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); *Moore v. State*, supra. Appellant's first point of error is overruled.

Appellant's fifth point of error alleges trial court error in overruling appellant's challenge for cause as to veniremember Kiker on the grounds that Kiker could not consider age as a mitigating factor at punishment. See Article 35.16(c)(2), V.A.C.C.P.

[14] Appellant misconstrues the law when he characterizes Kiker's inability to consider age as a mitigating factor as a prejudice against the law applicable to the appellant's case. Although not cited in the briefs of either party, this Court has recently determined that it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of "mitigating evidence" any consideration. *Cuevas v. State*, 742 S.W.2d 331 (Tex.Cr.App. 1987) cert. denied — U.S. —, 108 S.Ct. 1488, 99 L.Ed.2d 716 (1988); *Cordova v. State*, 733 S.W.2d 175 (Tex.Cr.App.1987), cert. denied — U.S. —, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988).

3. Although it appears that the excuse raised by veniremember Walker is more along the lines of an exemption as per Section 62.106(2) of the Government Code, which states that a person qualified to serve as a juror may nonetheless establish an exemption from service if he has legal custody of a child or children younger than 10 years of age and that service requires leaving them without adequate supervision. We find that this exemption was not raised, therefore, we do not decide the applicability of the exemption, i.e., "legal custody," to grandmothers, such as veniremember Walker.

The United States Supreme Court has not yet mandated that jurors *must* give any amount of weight to any particular piece of evidence that might be offered in mitigation of punishment. *Cordova*, 733 S.W.2d at 189. What the Court has decided is that the factfinder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the punishment questions. *Cordova* at 189, citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also *Cuevas*, 742 S.W.2d at 345. What this means is the factfinder must be allowed to hear the evidence and to act upon it. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. See Article 37.071, V.A.C.C.P. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. *Adams*, 448 U.S. at 46, 100 S.Ct. at 2526. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror." *Cordova* at 189, quoting *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Cuevas*, 742 S.W.2d at 346.

During the voir dire examination of Kiker, she stated that as between a nineteen year old defendant with the maturity of a twenty-five year old versus a nineteen year old defendant with the maturity of a twelve year old, that as to punishment these people should be treated the same.

It was this inability to consider "either mental age or physical age" as a mitigating factor that appellant based his challenge. The trial court overruled appellant's challenge for cause finding that it was not a proper ground for disqualification.

[15, 16] The mere fact that a prospective juror, during voir dire, acknowledges that in their mind such evidence deserves little or no weight, does not create a sustainable challenge for cause under Article 35.16. See *Cuevas*, 742 S.W.2d at 345; *Cordova*, 733 S.W.2d at 189. We find the trial court committed no error in its ruling. Appellant's fifth point of error is overruled.

Lastly, appellant's third point of error alleges the trial court erroneously granted the State's challenge for cause to veniremember Guzman. Appellant asserts that it was not clear from the record that Guzman could not read or write.[4] Article 35.16(a)(11), V.A.C.C.P.

First, it has long been the law of this state that the statutory requirement that jurors be able to read and write meant something more than the mere ability to "write his name and nothing more." *Hernandez v. State*, 506 S.W.2d 884 (Tex.Cr.App.1974). Rather, the prospective juror should possess the ability to express their ideas in words upon paper. *Hernandez* at 887 citing *Johnson v. State*, 21 Tex.App. 368, 17 S.W. 252 (1886). This is a determination which rightfully belongs to the trial court and, absent an abuse of discretion, such a finding will not be disturbed on appeal. *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App.1979) (vacated and remanded on other grounds, 453 U.S. 902, 101 S.Ct. 3133, 69 L.Ed.2d 988 (1981)).

4. The State was sustained on two separate challenges for cause of veniremember Guzman. The first regarding her ability to read and write and the second that she possessed a conscientious scruple against infliction of the death penalty as well as a bias or prejudice against the law upon which the State was entitled to rely. Article 35.16(b)(1), (3), V.A.C.C.P. Appellant objected to both challenges. As we find the first challenge under Article 35.16(a)(11) proper, we need not address the merits of the second challenge for cause sustained by the trial court and complained of herein by appellant.

During the State's examination of prospective juror Guzman, she stated that she could read but not very well since the extent of her education went no further then the fourth grade. In regards to the juror questionaire, Guzman stated that there were words that she did not understand, she did not know how to explain the answers she wished to express, that she "did not know how to put it." Guzman testified she could write but could not spell some of the words in the answers she wanted to put down so she would just leave those questions blank.

Guzman further testified specifically as to the charge that would be given in this case that if it contained "big words" then she would not be able to read and understand the charge. When asked about the three special punishment questions she stated she could read and understand some of them but did not understand the rest. She could not pronounce nor did she know what the word "deliberate" meant or what was the import of that part of the second question regarding "continuing threat to society", although she could read at least the first part of the question. She further stated that she did not know what it meant to "do something deliberately" that she had never seen the word until she saw the charge. Veniremember Guzman further testified that although she could read the instructions, it might however take her as many as five readings before she would be able to answer one question. She stated she would probably still not understand the questions and therefore would have to have somebody explain their meaning to her. Before ruling upon the State's challenge for cause pursuant to Articles 35.16(a)(11), (b)(1), (3), the court asked Guzman the following question:

"The Court: In talking about intentional. let me read this to you. A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious desire to engage in the conduct or cause the result. Do you know what that means?

"Veniremember Guzman: No, sir."

The court then sustained the State's challenge for cause on all grounds raised over appellant's objections.

[17] The record more than adequately reflects that Guzman, having obtained only a fourth grade education, could not satisfy the statutory requirement of having the ability to read and write. It is clear that she did possess rudimentary grammatical skills, however, these in and of themselves, will not satisfy the statutory requirement. *Hernandez v. State*, 506 S.W.2d 884 (Tex.Cr.App.1974). Given the fact that the trial court found Guzman's abilities to be in question, we find from the record sufficient evidence which supports the trial court's decision and therefore, the trial court did not abuse its discretion in sustaining the State's challenge for cause under Article 35.16(a)(11), V.A.C.C.P. Appellant's third point of error is overruled.

We, therefore, affirm appellant's conviction and sentence of death.

CLINTON, J., finds the majority is creating a new unsupported rule for reviewing exercise of discretion and therefore joins only the judgment of the Court.

TEAGUE, J., dissents.

DUNCAN, J., not participating.

Ex parte Robert Sammy BROWN.

No. 70700.

Court of Criminal Appeals of Texas, En Banc.

June 21, 1989.

Defendant was convicted in the Criminal District Court, Tarrant County, L. Clifford Davis, J., of attempted murder, and defendant applied for writ of habeas corpus. The Court of Criminal Appeals, W.C.

APPENDIX B

DORSEY LEE JOHNSON, JR., Appellant

No. 69,750 vs. Appeal from SCURRY County

THE STATE OF TEXAS, Appellee

OPINION ON APPELLANT'S
MOTION FOR REHEARING

Appeal was taken from a conviction for capital murder.[1] After finding appellant guilty, the jury returned affirmative findings to the statutory special issues.[2] Punishment was assessed by the trial court at death.

On original submission, this Court overruled appellant's points of error and affirmed his conviction.[3] In his motion for rehearing, appellant presented five grounds for rehearing. This Court granted only appellant's fifth ground, in which he complained the trial court erred when it failed to instruct the jury at punishment that they could consider appellant's age, or other factors, as a mitigating circumstance. Appellant cited Penry v. Lynaugh,[4] as support for this ground for rehearing.

At trial during punishment, appellant requested an additional instruction on consideration of mitigating evidence. The trial court agreed, and gave this instruction to the jury:

> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues."

The trial court did not specifically apply this instruction to the factor of appellant's youthful age, nor did appellant request the trial court to do so. In addition, this instruction did not present

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[1] TEX. PENAL CODE § 19.03 (a)(2).

[2] TEX.CODE CRIM.PROC. ANN. art. 37.071.

[3] Johnson v. State, 773 S.W.2d 322 (Tex.Cr.App. 1989).

[4] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

consideration of mitigating evidence as a third special issue upon which the jury could choose to sentence appellant to life imprisonment.[5] It is in this motion for rehearing that appellant has raised for the first time the failure of the trial court to instruct the jury that it could consider appellant's age in mitigation of his punishment.

We will overrule this ground for rehearing for two reasons.

The only mitigating evidence mentioned by appellant in this motion for rehearing is his age at the time of the commission of the instant offense. Appellant does not even state what his age was at the time of the commission of the instant offense. From the decision of this Court on original submission, wherein we described the voir dire of venireperson Kikar, we could assume that appellant's age was nineteen when the instant offense was committed.[6]

Because age is the only mitigating factor mentioned by appellant, we will review the instant case from the perspective of determining if the trial court's instructions at punishment permitted the jury to consider and give mitigating effect to appellant's youthful age when he committed the instant offense.[7]

In Lackey v. State,[8] this Court held that the defendant's youth was relevant to a proper resolution of the concerns of special issue two.[9] If a juror believed that appellant's violent actions were a result of his youth, that same juror would naturally believe that appellant would cease to behave violently as he grew older. Such a juror would be able, under special issue number two,

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[5] See TEX.CODE CRIM.PROC.ANN. art. 37.071, Sec. 2 (e) & (f) (Vernon's 1991).

[6] See Johnson v. State, 773 S.W.2d, at 331.

[7] Penry v. Lynaugh, 109 S.Ct. 2934; Black v. State, 816 S.W.2d 350 (Tex.Cr.App.1991).

[8] Lackey v. State, 819 S.W.2d 111, at 134 (Tex.Cr.App.1991).

[9] See TEX.CODE CRIM.PROC.ANN. art. 37.071 (b)(2).

to express a reasoned moral response to applicant's youth. We find, in the instant case, that the art. 37.071 instructions did not restrict the instant jury from considering and giving mitigating effect to the evidence of appellant's age.[10]

We conclude that the trial court did not err when it did not specifically instruct the jury to consider and give effect to appellant's age at trial, since the jury was able to express a reasoned moral response to appellant's mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court. We hold article 37.071 was not unconstitutionally applied to appellant. Appellant's fifth ground for rehearing is overruled.

Appellant's motion for rehearing is denied.

PER CURIAM

(Delivered May 27, 1992)

En Banc

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Clinton, J., dissents

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[10] Lackey v. State, supra. See also Graham v. Collins, 950 F.2d 1009 (1992).